

**REMARKS**

Applicant appreciates the Examiner's thorough examination of the present application.

Applicant respectfully asserts that claims are allowable herein over the Examiner's rejection under 35 U.S.C. §103. Applicant respectfully requests favorable reconsideration of the claims based on the amendments and remarks set forth herein.

**Rejections Under 35 U.S.C. §103 (a)**

Claims 1-25 have been rejected under 35 USC §103 based on a combination of Midden and Bukoschek and further in combination with Weichenrieder or Fogo. Applicant respectfully asserts that the claims as amended herein overcome and allowable over the Examiner's rejection under 35 USC §103.

With regard to the rejections under 35 U.S.C. §103 (a), it is respectfully submitted that applicants claims are patentable, as the Examiner has failed to establish a *prima facie* case of obviousness. According to section 706.02 (j) of the MPEP the Examiner must meet three basic criteria to establish a *prima facie* case of obviousness:

- (1) first, there must be some reasonable suggestion or motivation in the prior art to modify the reference or to combine the reference teachings;
- (2) second, there must be reasonable expectation of success in obtaining the claimed invention based upon the references relied upon the Examiner; and
- (3) third, the prior art reference (or references when combined) must teach or suggest all of the claimed limitations.

MPEP Section 706.02(j) further requires that the teaching or suggestion to make the modification or reference combination and the expectation of success, must be found in the prior art, and may not be based upon the applicants disclosure.

The rejections under 35 USC §103 are dependent upon a combination of Midden and Bukoschek. Applicant respectfully asserts the combination of Midden and Bukoschek does not

support the rejection under 35 USC §103 either alone, or in combination with other references as noted by the Examiner.

The device in Midden is similar to the device of the present invention in that it includes a hopper with a horizontally oriented rotatable mixing member. The rotatable mixing member rotates on a generally horizontally oriented axis defined within the beverage hopper. However, as noted by the Examiner, Midden does not include the reversible operating mixing member.

The Examiner refers to Bukoschek to provide a scraper which is operational in two directions. Bukoschek includes a single-phase synchronous motor which rotates the scraper about a generally vertically oriented axis. Bukoschek does not include a controller and a drive motor coupled to a controller. Rather, Bukoschek relies on the intentional change in thickness of the material in the apparatus to cause the motor to lock up and automatically reverse direction of rotation. In other words, this system requires the motor to overload before it is reversed and no controller is involved in the operation of the motor.

In contrast, the claimed invention includes the generally horizontally oriented rotatable mixing member, a controller and a drive motor coupled to the controller.

There is no reasonable suggestion or motivation in the prior art to modify Midden and Bukoschek to achieve the claimed invention. Midden does not teach reversing the motor operating the rotatable mixing member. While Bukoschek does teach reversing the motor it does so through a more rudimentary uncontrolled and uncontrollable method whereby the motor must be overloaded. This could lead to excessive motor wear. As such, the combination of Midden and Bukoschek would result in substituting the motor of Midden for the synchronous single-phase motor of Bukoschek. There is no reasonable expectation of success in obtaining the claimed invention based on the combination of Midden and Bukoschek. Rather, the combination would result in substituting the motor of Bukoschek to achieve the reversible motor in combination with the device of Midden. This would not be a reasonable expectation of success

in obtaining the claimed invention which includes the controller and drive motor which is controllably operated by the controller.

The prior art references, when combined, do not teach all of the claim limitations. The single-phase synchronous motor as shown and described in Bukoschek is not the controller and controllable, reversible drive motor combination as taught in the independent claims. These limitations apply to both the apparatus and method claims in the present application.

The prior art does not teach or suggest making the modification or reference combination unless Applicant's disclosure is used. In this regard, Midden shows a hopper with a generally horizontal rotary member. However, the rotary member is intended to drive in one direction, forwardly, to drive material towards the dispensing outlet. Similarly, Bukoschek is intended to reverse but only as the result of the thickening of the material. The thickening of the material in Bukoschek causes the motor to overload thereby causing reversal of the motor. This is intended not to prevent the formation of an ice hump as in the present application, but to indicate that the material being prepared is approaching readiness for serving. To take the very different teachings of the cited references and try to modify them to achieve the claimed invention can only be accomplished by the teachings of the claimed invention. This would be inappropriate hindsight reconstruction.

With the foregoing in mind, Applicant respectfully asserts that the combination of the Midden and Bukoschek references do not teach all of the claim limitations and as such do not support the rejection of the present claims. Due to the failure of the Midden and Bukoschek references to support the rejection under 35 USC §103, neither of these references either alone or in combination with the other cited references provide support for the rejection.

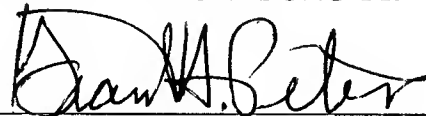
With the foregoing in mind, Applicant respectfully asserts that the reference fail to support the rejections under 35 U.S.C. §103 and as such Applicant respectfully requests withdrawal of the rejections and allowance of the claims.

If there is any issue remaining to be resolved, the Examiner is invited to telephone the undersigned so that resolution can be promptly affected.

It is requested that, if necessary to effect a timely response, this paper be considered as a Petition for an Extension of Time sufficient to effect a timely response with the fee for such extensions and shortages in other fees, being charged, or any overpayment in fees being credited, to the Account of Barnes & Thornburg, Deposit Account No. 12-0913 (27726-96969).

Respectfully submitted,

BARNES & THORNBURG LLP

A handwritten signature in black ink, appearing to read "Grant H. Peters", written over a horizontal line.

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Dated: November \_16\_, 2009